FILED
DEC 26 1951
CHARLES ELMORE CRO
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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 494

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO. and H. M. LORBER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. .....

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO. and H. M. LORBER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO. and H. M. LORBER pray that a writ of certiorari issue to review the judgment entered on October 3, 1951 by the United States District Court for the Northern District of California in the case of *United States of America v. R. Stanley Dollar, et al.*, now pending in the United States Court of Appeals for the Ninth Circuit Court as Case No. 13,130, on appeal by plaintiff, and the injunction issued on December 14, 1951, by said Court of Appeals against petitioners, thereby removing the entire record and cause from said Court of Appeals to this Court.

OPINIONS BELOW

The opinion of the District Court (R. 282-307) is not yet reported. A complete copy was filed by us with this Court on October 8, 1951 in Cases Nos. 32, 34, 247 and 248 as an appendix to "Respondents' Memorandum Calling Attention to Changed Circumstances by Reason of Event of October 3, 195., and Suggesting that Nos. 32, 34, 247 and 248 are Moot, and that the Orders Granting the Petitions for Writs of Certiorari in Nos. 32 and 34 be Vacated."

The Court of Appeals has not yet heard the appeal, but on November 20, 1951 issued a brief per curiam opinion on application for an injunction pending appeal (R. 368).*

JURISDICTION

The judgment of the District Court was entered on October 3, 1951 (R. 307). The plaintiff, the United States, appealed on October 4, 1951 (R. 308), and the cause is pending in the Court of Appeals for the Ninth Circuit, still unheard on the merits. This petition is filed by the parties prevailing in the District Court. On December 14, 1951, the Court of Appeals issued an injunction against petitioners on appellant's application (R. 374). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

The Court has power to issue a writ of certiorari before decision in the Court of Appeals. Rule 39. Many cases where that power has been exercised are cited in the government's petition for certiorari in *United States v. United Mine Workers,* Oct. Term, 1946, Nos. 759-760 (at pp. 28, 29).

In such a case the Court may also issue the writ on petition of the party prevailing in the District Court. Title 28 U.S.C., Sec. 1254(1) authorizes a writ "upon the petition of any party," and "the sole essential of this Court's jurisdiction to review is that there be a case pending in the Circuit Court of Appeals," *Gay v. Ruff,* 292 U.S. 25, 30. The Court has exercised this power in cir-

*Earlier opinions relative to a preliminary injunction are reported in 97 F.Supp. 50 and 190 F.2d 547.

cumstances analogous to those presented here. *United States v. United Mine Workers,* 329 U.S. 708; *United States v. Bankers Trust Co.* (reported sub nom *Norman v. Baltimore & O. R. Co.*), 294 U.S. 240, 243, 294-295. The government's petition in the case just cited, Oct. Term, 1934, Nos. 471-2, contains a full discussion of the Court's power in the premises. See also, Robertson & Kirkham (Wolfsohn & Kurland ed., 1951), Jurisdiction of the Supreme Court of the United States, pp. 238, 239.

QUESTIONS PRESENTED

The appeal from the final decree presents three major questions, but if any one of them is answered favorably to petitioners, it will be unnecessary to answer the other two.

1. It is the rule that if one who has an interest in the outcome of an action controls it, he is as bound by the adjudication of litigated matters as if he were a formal party. *Souffront v. Compagnie des Sucreries,* 217 U.S. 475; *Restatement of Judgments,* Sec. 84. Does not this rule apply to the United States as much as to any other litigant, as *Drummond v. United States,* 324 U.S. 316, indicates? And is that not particularly so where the United States also appears *eo nomine* to vacate the judgment and appeal from denial? And is it not even more true where, by stipulation of the Attorney General, the subject matter has been placed *in custodia legis* in the first action?

2. When a United States Court of Appeals has held that on a given issue only one conclusion is possible and a final decree is entered accordingly, is not a District Court in another case turning on the identical issue, where the identical record is presented, warranted in entering a summary judgment?

3. Did Section 207 of the Merchant Marine Act of 1936 empower the United States Maritime Commission to acquire outright title to the corporate shares involved in *Land v. Dollar,* 330 U.S. 731, in the transaction there referred to?

The Ninth Circuit's injunction presents two further questions:

4. Where a Court of Appeals for one circuit has entered a final decree for possession of property in a suit against govern-

ment officials, may a Court of Appeals for another circuit issue an interlocutory injunction restraining enforcement of that decree in a suit instituted in the name of the United States to quiet title? May it do so on appeal from a final decree adverse to the United States?

5. In issuing an injunction must not a Court of Appeals make findings just as a District Court must do under R.C.P. Rule 65(d)?

STATUTE INVOLVED

The relevant provisions of Section 207 of the Merchant Marine Act of 1936 as amended, 49 Stat. 1985, 46 U.S.C., Sec. 1101, et seq., and of R.C.P. Rule 65(d) are set forth in an appendix.

STATEMENT

In its per curiam opinion of June 4, 1951, *Land v. Dollar,* 341 U.S. 737, 739, the Court notes that "on June 1, 1951, the District Court for the Northern District of California began its hearing on defendants' * * * motion to dismiss the complaint and for summary judgment." That motion was granted October 3, 1951, and the subject of this petition is the judgment entered accordingly.

The facts are thus already before the Court in connection with Cases Nos. 32, 34, 247 and 248. We therefore state them briefly.

On March 12, 1951 this Court denied certiorari in *Land v. Dollar, Sawyer v. Dollar* (No. 552), as well as a motion for rehearing of denial of certiorari (No. 353), 340 U.S. 948. Thereby the finality of the decisions of the Court of Appeals for the District of Columbia Circuit was left unimpaired. By those decisions R. Stanley Dollar, et al. are entitled to effective possession of certain shares of stock of American President Lines.

Thereupon, on the same day, the Department of Justice filed the instant suit in the District Court in San Francisco, against the prevailing parties in *Land v. Dollar,* to quiet title to the shares in the United States (R. 3, 55).*

*The complaint also appears at p. 869 of the record in Nos. 32 and 34.

A week later the Department of Justice applied in this suit for a preliminary injunction to prevent the Dollars from enforcing their final judgment in *Land v. Dollar* (R. 56).* Thereupon the Court of Appeals for the District of Columbia Circuit issued an order restraining prosecution of that application and enforcement of any injunction obtained.† The Chief Justice stayed the restraining order, and on June 4, 1951 this Court granted certiorari to review it (in cases now numbered 32 and 34). Meanwhile, on April 11th the District Court issued a preliminary injunction herein, as prayed (R. 161).

On May 18, 1951, the Court of Appeals for the District of Columbia Circuit adjudged the Secretary of Commerce, the Solicitor General and others, including attorneys in the Department of Justice, guilty of contempt, in proceedings involving activities in the instant suit.‡ The Chief Justice stayed that order, and on November 13, 1951 in Nos. 247 and 248 this Court granted certiorari to review the order of May 18th.

Meanwhile, on October 3, 1951 the District Court in San Francisco entered its final judgment quieting title in the Dollars against the United States (R. 282). The next day the plaintiff appealed that judgment to the Court of Appeals for the Ninth Circuit (R. 308). By the present petition we ask that the cause be transferred to this Court before hearing and decision there.

The judgment of October 3rd was entered upon granting our motion to dismiss, for judgment on the pleadings, and for summary judgment. That motion (R. 257) was made on six grounds, but the principal ones may be summarized thus:

1. The suit involves the same transaction as *Land v. Dollar* and the same issue whether certain transfers of shares in 1938 to the United States Maritime Commission were in pledge or a sale. The record on which *Land v. Dollar* had been adjudicated was introduced in support of the motion and the truth of all

*The application also appears at p. 127 of the record in Nos. 32 and 34.

†P. 236 of record in Nos. 32 and 34.

‡P. 346 of record in Nos. 247 and 248.

matters therein proved was established in appropriate manners as by requests for admissions of fact, and no showing whatever was made in opposition (R. 259, 242, 126-130). As the court said, "In response to this showing the Government has done nothing." (R. 288). There was thus no genuine issue of fact, and the undisputed facts establish that the transfers were by way of pledge.

Moreover, on precisely the same facts a United States Court of Appeals had held that no conclusion was possible other than that the transfers were in pledge. That decision, as a matter of authority or *stare decisis*—apart from any questions of *res judicata* or collateral estoppel—showed that there was no genuine issue of fact.

Therefore a summary judgment was proper.

2. The adjudication in *Land v. Dollar* that the 1938 transfers were in pledge is conclusive on the plaintiff because of facts occurring after this Court's decision in April 1947 in *Land v. Dollar*, 330 U.S. 731. Up to that point the Department of Justice had been in the cause only to protest against the exercise of jurisdiction. Being overruled on that protest, the Attorney General had a choice to step out of the litigation or, deciding that the interests of the United States were better served by handling the case on the merits, to stay in. He chose the latter. He and those acting under his supervision handled the case at all subsequent stages, in the name of defendants, but on behalf of the United States, asserting that they were doing so as government counsel and that the United States was the real party in interest. Throughout the subsequent course of the litigation they completely took over, controlled and handled the case against the Dollars to the entire exclusion of anyone else, doing so at the expense of the Treasury, for the benefit of the United States, and for it as the real party in interest. In the words of *Drummond v. United States*, 324 U.S. 316, 318, the United States, though not formally a party, took the laboring oar in the controversy.

Moreover, after remand by this Court in 1947, the Attorney General entered into a stipulation which placed the shares *in*

custodia legis in the District of Columbia courts (R. 194, 195).* And later, after denial of certiorari by this Court on November 13, 1950, 340 U.S. 884, the Attorney General appeared in the name of the Secretary of Commerce and in the name of the United States, *eo nomine,* to oppose entry of judgment, to move to vacate the judgment, and to appeal (R. 188, 244, 253).

3. In *Land v. Dollar,* 330 U.S. 731, this Court said that if the Commission had no authority to purchase the shares or acquire them outright, the United States never acquired title. Here the complaint rests the United States' claim of title on the identical transfers, and so on the face of the complaint the identical issue is presented. That is purely an issue of law, the Maritime Commission did not have the authority, and therefore the complaint shows on its face that the United States acquired no title.

In granting the motion to dismiss, for judgment on the pleadings and for summary judgment, the District Court rested on the grounds digested as numbers 1 and 2 above. As its opinion states (R. 289):

> "The Dollar defendants have made an affirmative showing that the issues in this case are the same as those which were before the courts in the District of Columbia and have heretofore been adjudicated. Defendants argue that plaintiff is concluded as to the issues there decided or, alternatively, if the Government is not estopped that the case is before us on the identical record upon which the Court of Appeals was compelled to reverse on the grounds that it contained no substantial evidence of absolute transfer. *A fortiori,* no genuine issue of fact is here presented and a summary judgment must be entered for defendants."

Proceedings for Injunction Pending Appeal.

Upon filing its appeal appellant applied to the District Court for an injunction against the prevailing parties (petitioners) to continue the restraint imposed by the preliminary injunction, pending appeal (R. 309). The motion was denied, October 10th (R.

*The stipulation and order thereon appear at p. 80 of the record in Nos. 32 and 34, and cf. pp. 66, 67.

326). Appellant applied to the Court of Appeals for such an injunction. The motion was submitted on October 16th. On November 20th the court stated in a per curiam opinion that "it is appropriate that a stay or supersedeas be granted," and it directed government counsel to submit a form of injunction "to preserve the status quo pending appeal." (R. 369).

On December 14, 1951, it issued an injunction restraining petitioners until further order of the court from seeking to obtain issuance in their own names of certificates for the stock of American President Lines awarded to them by final decree of the Court of Appeals for the District of Columbia Circuit in *Lane v. Dollar*, or from seeking to obtain registration of said shares in their names (R. 374).

REASONS FOR GRANTING THE WRIT

1. One of the Principal Questions Is Already Before the Court on Writs Recently Granted, and the Present Case Presents the Question on a More Complete Record.

In the Solicitor General's petition in No. 247 the first reason assigned for granting a writ was that the order of the Court of Appeals for the District of Columbia Circuit is based on the premise that "the District of Columbia * * * litigation adjudicated the rights of the United States to the stock." A similar assertion was made in the Solicitor General's petition in No. 697, Oct. Term 1950, now No. 32.

We said in reply that the order proceeded on no such premise, but we added (p. 9):

> "Of course, if the basic judgment, which this Court has thrice declined to review, concludes the United States, the ground on which petitioners base their resistance to the judgment disappears. Consequently, should a writ be granted, we shall ask the Court to hold that the United States is concluded on the principles of collateral estoppel."

We further said:

> "We have lightly sketched our contention in a footnote on page 19 of our brief in opposition to certiorari in No. 697, Oct. Term, 1950."

Since the Court has now granted the writs in Nos. 32, 34, 247 and 248, the issue of collateral estoppel is already before the Court and will be briefed by us.

The same issue is involved in the instant cause, as one of the two independent grounds of the District Court's decree quieting title in the Dollars.

In the various aspects of the litigation that have come to this Court the printed record of what transpired between the decision in 1947, *Land v. Dollar,* 330 U.S. 731, and the decision of July 17, 1950 in *Dollar v. Land,* 184 F.2d 245, consisted of the printed Joint Appendix to the briefs in the Court of Appeals for the District of Columbia Circuit. The parties had omitted from that Joint Appendix certain material not deemed relevant to the issues *then* involved. Among the omitted matters were frequent assertions by counsel for Land, et al. that they represented the government, that the individual defendants were their clients only "technically," that the real client was the United States, and that "the Government is the real party in interest." These matters were all brought before the District Court in San Francisco in support of the motion for summary judgment (R. 259, 264-275). Some of these passages are referred to in its opinion of October 3, 1951 (R. 295).

Other evidence was also placed before that District Court, such as a deposition, taken in March 1951, of one of the attorneys of the Department of Justice who is counsel both for the United States here and for defendants in *Dollar v. Land* (R. 259, 295, 296, 79 et seq.).

2. Affirmance Here Will Make It Unnecessary to Decide Nos. 32, 34, 247 and 248.

Furthermore, affirmance of the final decree here, on any of the grounds on which the motion was made, will certainly make it unnecessary for this Court to decide Nos. 32, 34, 247 and 248. Petitioners will have a final decree quieting their title and will be entitled to possession of the shares as an incident of the title.

Questions of their right to enforce possession under the decrees of the District of Columbia courts or of conflict between federal courts will vanish. So also will questions of contempt of court by high federal officials, since the contempt order of May 18, 1951 of the Court of Appeals for the District of Columbia was purely prospective in operation.

In this connection note may be taken of an issue that seems to have been lost sight of, the issue whether the Maritime Commission ever had authority to take title to the stock outright. If not, the United States never acquired title, *Land v. Dollar,* 330 U.S. 731, the judgment of the District Court quieting title in the Dollars must be affirmed, and with that affirmance the various questions before this Court in Nos. 32, 34, 247 and 248 become irrelevant. The question of the Commission's authority is presented on the face of the complaint and requires no considerations of fact for its determination. Although this issue was not discussed in the District Court's opinion, if the decree is correct on this ground, it must be affirmed. *Helvering v. Gorman,* 302 U.S. 238, 245.

3. The Attorney General Has Stated His Belief That This Is a Proper Case for Granting a Writ at This Juncture.

The Attorney General has already in effect informed this Court that he will consent to its granting certiorari herein, before decision by the Ninth Circuit. On April 11, 1951, he filed in this Court in *Land v. Dollar,* an "Application for a Stay of the Order to Show Cause in Civil and Criminal Contempt issued by the Court of Appeals."* It was there said (p. 2):

> "The Attorney General further states that if and when an appeal is filed by R. Stanley Dollar, et al., in the United States Court of Appeals for the Ninth Circuit, from the injunction issued by the California District Court, the United States will consent to an application by Dollar, et al. for a writ of certiorari to that court before judgment so that this Court may be in a position to resolve all phases of the ques-

*Denied April 21, 1951, *Land v. Dollar,* 341 U.S. 912.

tion whether the United States is any way concluded by the judgments entered in this litigation by the federal courts in the District of Columbia."

While this passage refers to an appeal from the preliminary injunction, its reasoning applies with greater force to the appeal taken by the United States from the final decree thereafter entered.* That was recognized in a memorandum filed herein by the Solicitor General in *Land v. Dollar* on May 29, 1951. He referred to the appeal from the preliminary injunction, remarked that "It is not unlikely that the Dollars will file petitions before submission of these appeals to the Court of Appeals * * *," and said

> "The pending motions in the California District Court for judgment, again raising closely related issues, will probably be put before this Court at about the same time."

4. The Ninth Circuit Appears to Say That This Court Has Foreclosed One of the Major Issues on the Appeal.

None of the issues involved on the merits of the final judgment herein has ever been briefed, argued or submitted to the Court of Appeals for the Ninth Circuit. Nevertheless that court appears to have said that this Court has foreclosed the issue of collateral estoppel.

The appellant filed in the Court of Appeals for the Ninth Circuit a motion for an injunction to preserve what it called the status quo pending consideration of the appeal.† The motion, heard October 16th, was held under submission until after this Court granted certiorari in Nos. 247 and 248 on November 13th. The motion was then granted on November 20th by a per curiam opinion, which contains this passage (R. 368):

> "Briefly stated, the ground of the trial court's holding is that, by reason of the intervention of government coun-

*The preliminary injunction terminated with the entry of the final decree.

†On October 12, 1951, the Solicitor General informed this Court of that fact by a memorandum filed in Nos. 33, 34, 247 and 248.

sel in the suit of Dollar v. Land, the United States is estopped to relitigate the issues determined in that suit by the district and appellate courts of the District of Columbia Circuit. This would seem to be but another way of saying that the judgments there rendered are res judicata as regards the claims of the government. The holding appears at war with the repeated pronouncements of the Supreme Court that the judgments entered in Dollar v. Land would not be res judicata against the United States. Land v. Dollar, 330 U.S. 731, 736, 737, 739; Land v. Dollar, 341 U.S. 737, 739. That the Supreme Court was not unaware of the intervention of government counsel in those suits is evidenced by the remarks of Mr. Justice Frankfurter in his separate memorandum in Land v. Dollar, 341 U.S. 737, 741. He there said that 'At every stage, the Commissioners were represented by attorneys from the Department of Justice, who asserted as ground for dismissal that the action was a suit against the United States to which consent had not been given.'

"In this situation it is appropriate that a stay or supersedeas be granted."

When this Court decided *Land v. Dollar,* 330 U.S. 731, in April 1947 it did not have before it the acts which thereafter occurred and which thereafter brou[illegible] into operation the principles of collateral estoppel.* What it said in its per curiam opinion of June 4, 1951 (*Land v. Dollar,* 341 U.S. 737) was an historical recital. Certainly the Court did not then assume to decide an issue not then before it or briefed. In our brief in opposition in No. 697, Oct. Term, 1950 (filed May 10, 1951) we said (p. 19):

"The argument which petitioners now make rests entirely on the premise that the judgment is not *res judicata* as respects the United States. Were this so, it would still be utterly irrelevant, as the court below, in its powerful opinion

*Contrary to what the Court of Appeals asserts in its per curiam opinion, *res judicata* and collateral estoppel are not necessarily the same. *Res judicata* would preclude the United States from asserting title on any ground whatever, whether involved in the first suit or not. Collateral estoppel merely goes to the single question whether title passed under the particular transfers of 1938.

of April 11, 1951, demonstrates. That opinion proceeds on the assumption that the judgment is not *res judicata* against the United States. Our discussion proceeds on the same assumption, although we believe that the determination that the 1938 contract was a pledge is conclusive against the United States * * *. It [that issue] will arise in the San Francisco suit when the defense is pleaded, but it has not yet arisen here."

Thereafter the defense was pleaded in the San Francisco suit. Then, for the first time in any court it became an issue, for the first time it was fully briefed and argued, and the court was persuaded of its correctness and gave judgment.

There has been growth in the principles of conclusiveness of judgments. *Caterpillar Tractor v. International Harvester Co.*, 120 F.2d 82 (3 Cir.). As between private parties it is now settled that one who controls an action on one side or the other for the protection of his own interests is as bound as if he had been a party of record. *Restatement of Judgments*, Sec. 84; *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 487; *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.*, 116 F.2d 845, 846 (2 Cir.) (Learned Hand, J.); *Caterpillar Tractor v. International Harvester Co.*, supra.

It has been conceded that the facts of the litigation would make the principle applicable if the suit were between private parties. Yet the same principle applies to the United States when its attorneys handle and control a case, *Drummond v. United States*, 324 U.S. 316, 318; *United States v. Candelaria*, 271 U.S. 432, 16 F.2d 559; *Hill v. Wallace*, 259 U.S. 44, 62; *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 403; *Minnesota v. Hitchcock*, 185 U.S. 373, just as it does to a State, *Gunter v. Atlantic Coast Line Ry.*, 200 U.S. 273, or a city, *New Orleans v. Gaines' Administrator*, 138 U.S. 595, 607.

Handling of the case by the Attorney General after the decision in *Land v. Dollar*, 330 U.S. 731, had different consequences than handling it up to that time. Until then the Department of Justice was in the case "only to protest against the exercise of juris-

diction by the court," *Clark v. Barnard,* 108 U.S. 436, 448. The Department *then had to make a choice* whether to stay in or go out:—to go out and stand on the proposition that no judgment later entered, if adverse to defendants, would bind the United States; or to stay in on the view it was better "to face the controversy rather than to remit it to some other proceeding" where plaintiffs would be fortified by a favorable decision. But the Attorney General could not do both, for the doctrine of sovereign immunity does not go so far as to let the sovereign "come in and go out of court at its will." *Porto Rico v. Ramos,* 232 U.S. 627, 632.

In controlling the case the Department of Justice did so under the authority of 5 *U.S.C.,* Sec. 291, 309, 316, which authorized it to do so if it believed that the interests of the United States were better protected in that way. *Booth v. Fletcher,* 101 F.2d 676 (D. C. Cir.), cer. den. 307 U.S. 628. The Attorney General is "charged with representing the government's interests in court," *United States v. Allied Corp.,* 341 U.S. 1, he has broad power, not merely to institute suits to determine government rights to property, *United States v. California,* 332 U.S. 19, 26-28, but to intervene in suits between others for the same purpose, *New York v. New Jersey,* 256 U.S. 296, 308, and is not precluded from binding the United States, by intervening, on the theory that he may not waive sovereign immunity, *United States v. Bank of New York,* 296 U.S. 463, 480.

By asserting an interest in property in the United States, the Attorney General places it in the position of an actor, *United States v. Bank of New York,* supra, *United States v. Guaranty Trust Co.,* 76 F.2d 747 (2 Cir.), *United States v. Jacobs,* 100 F. Supp. 189. An intervention need not be formal to have all its consequences, 6 Cyc. Fed. Proc. (2d ed. 1943) 515, Sec. 2409, and this rule applies to states, *Clark v. Barnard,* 108 U.S. 436, 446, and to the United States, *In re Read-York, Inc., United States v. Davies,* 152 F.2d 313 (7 Cir.). Nor need the appearance on behalf of the sovereign be for it *eo nomine, Gunter v. Atlantic Coast Line Ry. Co.,* 200 U.S. 273.

The United States did in fact appear *eo nomine.* Prior to entry of judgment in the District Court in *Dollar v. Land* in December 1950, the Attorney General appeared for the Secretary of Commerce as such to object to entry of the judgment ordered by the Court of Appeals because he had been directed "to take all appropriate action to assert and maintain the government's rights as owner of the stock."* Thereupon the United States, *eo nomine,* and the Secretary of Commerce filed motions to vacate the judgment, and from a denial both appealed.† A motion to vacate judgment is a general appearance. *Feldman Investment Co. v. Connecticut General Life Ins. Co.,* 78 F.2d 838, 841 (10 Cir.); *Slocum v. Edwards,* 168 F.2d 627, 631 (2 Cir.). Where one appears in an action to assert rights, he becomes an actor, and "must take the consequences," *Merchants Heat & L. Co. v. Clow & Sons,* 204 U.S. 286, 290 (Holmes, J.). He is bound by the record as it stands at the time of his intervention; if that occurs after an appeal, he is bound by what has been determined on that appeal. This applies to governments. *State of Kansas v. Occidental Life Ins. Co.,* 95 F.2d 935 (10 Cir.). Although the appearance of the United States *eo nomine* was labeled special, one cannot prevent an appearance from being general by calling it special. *Davis v. Davis,* 305 U.S. 32, 42.

Furthermore, shortly after the remand by this Court in April 1947, the Attorney General executed a stipulation that placed the shares of stock *in custodia legis* (see pp. 6, 7, supra). The District of Columbia courts then became the proper courts for determining all questions respecting title, possession and control. *United States v. Bank of New York,* 296 U.S. 463.

5. The Ninth Circuit Has Placed Itself in Open Conflict with the District of Columbia Circuit.

As we have noted (p. 7, supra) the District Court quieted title in the Dollars on two grounds, each independently sufficient. The

*P. 10, Supp. Tr. in No. 552, Oct. Term, 1950. The transcripts in No. 552 are part of the record here (R. 188, 189, 244, 251, 259).

†Pp. 44, 45, 47, 48, Supp. Tr. in No. 552.

second ground was that the case was before it on the identical record on which a Court of Appeals had held that the transfers were so clearly in pledge that no court could hold otherwise. "*A fortiori,* no genuine issue of fact is here presented and a summary judgment must be entered for defendants."

In its opinion of November 20, 1951, the Court of Appeals for the Ninth Circuit completely ignored this second ground, as well as the legal issue of the Maritime Commission's power to acquire title.

It will be recalled that the Court of Appeals for the District of Columbia had ruled in *Land v. Dollar,* 184 F.2d 245 (cer. den. 340 U.S. 884):

> "It seems plain beyond question that if this transfer had occurred between two private individuals no court of equity would have treated the transfer of the shares as other than a pledge." (p. 253)

Again:

> "Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party." (p. 256)

In its opinion of April 11, 1951, *Land v. Dollar,* 190 F.2d 366, that court said (pp. 374, 375):

> "Whatever may have been the merits of the Government's claim prior to the final decision in this litigation, its claims as thus far represented to us do not appear to suggest a claim of present substance no matter from what viewpoint they are examined. * * *
>
> "* * * The question whether the United States is the owner of this stock has been presented to the courts and has been decided. The only basis thus far presented for the claim that the United States owns the shares is that the transaction in 1938 was an outright acquisition and not a pledge. That issue has been adjudicated to a final conclusion in a judicial proceeding in which the issue was properly before the court. We say 'a final conclusion' because surely an issue which has been presented three times to an appellate court and three

> times to the Supreme Court ought to be considered finally concluded. * * * The United States appears to seek to assert nothing of substance which has not been asserted and adjudicated. * * * The claim as presently presented is a patent prostitution of a principle of high public importance, which is that the Government may not be sued without its consent lest a mass of unimpeded litigation interfere with the performance of governmental functions."

And in its opinion of May 18, 1951, *Land v. Dollar,* 190 F.2d 623, the same court, answering the argument that its judgment was not *res judicata* against the United States and assuming for purposes of its decision that the argument was correct, said (p. 647):

> "Respondents seem to exaggerate the effect of the doctrine of *non res judicata.* The doctrine does not mean that the judgment is invalid or incomplete. The judgment is *stare decisis* even though not res judicata."

Upon the same record the same result should follow. *Prout v. Starr,* 188 U.S. 537.

In disregarding the second ground of the District Court's opinion and decree, the Ninth Circuit would seem to be placing itself in conflict with the Court of Appeals for the District of Columbia Circuit. In granting an injunction pending appeal against the party prevailing below, a court exercises an extraordinary power, *Virginian Railway Company v. United States,* 272 U.S. 658, and ought not to do so unless it is reasonably probable that appellant will ultimately prevail. Thus the Ninth Circuit seems to discard the carefully considered views of the District of Columbia Circuit on the merits.

The injunction makes clear that the Ninth Circuit has indeed placed itself in open conflict with its sister court. While it stated on November 20th that it would issue a "stay or supersedeas" or "an injunction to preserve the status quo pending appeal," the injunction which finally issued on December 14th, over two months after appellant applied for it, is none of these. Its restraint is as extensive as that imposed by the District Court's preliminary injunction which the final decree dissolved. A "stay

or supersedeas" confines its effect to the enforcement of the final decree in the instant case.* It does not touch the right of a litigant to enforce a final judgment obtained by it in another court. A "supersedeas would not continue the injunction or maintain the status quo ante of restraint upon the defendant," *Cumberland Tel. Co. v. Public Service Commission,* 260 U.S. 212, 215.

The injunction issued by the Ninth Circuit restrains petitioners from seeking to obtain registration of the stock in their names on the corporate books and from seeking issuance of certificates in their names (R. 374). It thereby enjoins them from enforcing their final decree for "effective possession," obtained in the Court of Appeals for the District of Columbia in *Dollar v. Land* and *Land v. Dollar.* The very least that that decree means is that the Dollars are entitled to certificates and registration of the stock in their own names. The Court of Appeals for the District of Columbia has twice made its meaning explicit—in its opinions of April 11, 1951 and May 18, 1951, *Land v. Dollar,* 190 F.2d 366; *Land v. Dollar; Sawyer v. Dollar,* 190 F.2d 623. Its contempt judgment of May 18th provided that the contumaceous parties must see that certificates are issued to petitioners here and that petitioners are registered as shareholders (see p. 365 of the record in Nos. 247 and 248. The Ninth Circuit's injunction prevents the petitioners here from demanding and receiving what the District of Columbia Circuit has ordered petitioners in Nos. 247 and 248 to give them.

The Ninth Circuit has thus recreated the conflict with the District of Columbia courts which was created by the preliminary injunction but had happily come to an end with the entry of the final decree herein.

Nor is the injunction an order to preserve a status quo. As said in *Sawyer v. Dollar,* 190 F.2d 623, 640:

> "The right to maintain status quo is mentioned several times in the responses. What status quo? In compliance with or in defiance of a validly entered court decree? It is perfectly clear that if 'status quo' is an apt phrase in respect

*Even a stay or supersedeas would not "detract from its decisiveness and finality." *Huron Corporation v. Lincoln County,* 312 U.S. 183, 189.

to such a situation *the preservable status is that existing after the court decree has been obeyed.* Pre-existing status cannot be resuscitated, even by directives of superior executive officials, after a court has fixed a new status."

In our brief in opposition to the petition for writ of certiorari in No. 32, we pointed out that the first federal court taking jurisdiction of a matter has exclusive power to decide it, render a judgment and *make it effective,* and that the District Court in California, in issuing its preliminary injunction, was ousting the Court of Appeals for the District of Columbia of its prior jurisdiction. To avoid repetition we refer to the authorities cited at page 27 of that brief (No. 697, October Term, 1950). Whether or not the District of Columbia judgment for "effective possession" is "binding" on the United States, "the public force is pledged" to enforce it, "and no one within the jurisdiction can oppose it"; it is "conclusive on all the world in what we may call its legislative effect." *Tilt v. Kelsey,* 207 U.S. 43, 57.

In issuing its preliminary injunction, the District Court acted without benefit of the two powerful opinions of the Court of Appeals for the District of Columbia Circuit of April 11 and May 18, 1951. But the Court of Appeals for the Ninth Circuit has knowingly set itself in conflict with its sister Court of Appeals. Similar conflict was the major basis for the request for certiorari in Nos. 32, 34, 247 and 248. The considerations prompting this Court to grant certiorari in those matters doubly warrant granting a writ now.

Moreover, the injunction issued by the Ninth Circuit contains no findings. If issued by a District Court, it would be invalid as violative of *R.C.P.* Rule 65(d). *Mayflower Industries v. Thor,* 182 F.2d 800 (3 Cir.). While the Rules of Civil Procedure do not in terms apply to a Court of Appeals, Rule 65(d) establishes a canon of conduct which a Court of Appeals ought to observe and which this Court may enforce "in the exercise of [its] power of supervision over the administration of justice in the Federal courts." *Thiel v. Southern Pacific Co.,* 328 U.S. 222, 225.

6. The Ninth Circuit Intrudes Upon the Province of This Court.

In granting the injunction the Ninth Circuit has also intruded on the province of this Court. It has in effect set itself up as a court of review over the April 11th and May 18th decisions of the Court of Appeals for the District of Columbia Circuit, although this Court had already taken review of those decisions. The contempt adjudication of the Court of Appeals for the District of Columbia Circuit, 190 F.2d 623, was an order of enforcement of the District of Columbia decree. Enforcement of that decree was stayed by the Chief Justice on May 22nd; by granting writs in Nos. 247 and 248 on November 13th this Court has continued that stay. The Ninth Circuit ought not to issue restraints operating on a subject matter now in the bosom of this Court, and this Court should take over the injunction proceedings together with the rest of the instant cause.

CONCLUSION

The public interest will be promoted by prompt settlement in this Court of the questions involved. In view of that fact and the unique situation presented by this litigation, in which four writs of certiorari have already been granted on petition of our adversaries and are presently before the Court, it is respectfully submitted that this petition be granted, and that the Court require a prompt response to it so that this case may go forward in briefing and argument with Nos. 32, 34, 247 and 248.

It is further prayed that this cause be consolidated for hearing with Nos. 32, 34, 247 and 248.

Dated: San Francisco, December 21, 1951.

Respectfully submitted,

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(Appendix follows)

APPENDIX

1. Section 207, Merchant Marine Act of 1936 (Act of June 29, 1936, 49 Stat. 1988, as amended by Act of June 23, 1938, 52 Stat. 954, 46 U.S.C. 1117):

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided,* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

2. Rule 65(d), R.C.P.:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; * * *.

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 494

R. STANLEY DOLLAR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The Solicitor General, on behalf of the United States, does not oppose the grant of the petition for a writ of certiorari. The issues decided in this case by the District Court for the Northern District of California are either the same or very closely related to issues in four cases pending argument in this Court. *Land* v. *Dollar,* No. 32; *Sawyer* v. *Dollar,* No. 247; *In re Killion,* Nos. 34 and 248. The Court of Appeals for the Ninth Circuit in its two interlocutory opinions in this case[1] has made it reasonably

[1] No. 12,917, June 22, 1951, on motion for stay of preliminary injunction, *Dollar* v. *United States,* 190 F. 2d 547; No. 13,130, Nov. 20, 1951, on motion for injunction pending appeal (R. 368).

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plain that its decision on the merits of this appeal will turn upon this Court's decision in the four cases now pending here.

2. We believe that the interests of the Government, of the Dollars, and of the courts themselves are advanced by as expeditious a termination of this litigation as may be possible.

That expedition, we suggest again, is best attained by a grant of the petition for rehearing in *Land* v. *Dollar*, No. 353, 1950 Term, now pending before this Court. The petitioners state (Pet. 9–10) that affirmance here (in No. 494) will make it unnecessary to decide Nos. 32, 34, 247, and 248. Reversal would, of course, leave the United States free to litigate further in its California suit. But this Court's decision either way on the basic issue of title to the disputed stock—which can only be had in No. 353—would immediately end the controversy in the courts. We repeat again that once this Court has spoken on that issue, the United States, which is now before this Court for the first time, would not seek to have a lower federal court decide otherwise, if this Court's judgment should be that the Dollars are entitled to a return of the stock. Therefore, we urge the Court to grant certiorari to review the judgment in No. 353. So far as we are able to appraise the situation, the possibilities which the Court may have had in mind when, last June, it ordered that No. 353 be kept open on the docket, have now de-

veloped to the point where the Court is enabled to act on all phases of the litigation.

3. Even if the petition for rehearing in No. 353 should not be granted, the Government agrees that the present petition should be granted. If the petition for rehearing in No. 353 is not granted, and if the Northern District's decision of "collateral estoppel" be reversed, then a full trial on the merits is necessary, with all the heavy costs, delay, and effort involved. Unless the present petition is granted and the case decided this Term, it does not seem likely that the preliminary litigation—all directed to confirming the right of the United States effectually to relitigate the issues decided against Land, et al.—can be concluded before the fall or winter of 1952.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1951